

**KRONENBERGER ROSENFELD, LLP**

Karl S. Kronenberger (Bar No. 226112)

Jeffrey M. Rosenfeld (Bar No. 222187)

150 Post Street, Suite 520

San Francisco, CA 94108

Telephone: (415) 955-1155

Facsimile: (415) 955-1158

karl@KRInternetLaw.com

jeff@KRInternetLaw.com

Attorneys for Defendants Omar Qazi  
and Smick Enterprises, Inc.

**UNITED STATES DISTRICT COURT  
NORTHERN DISTRICT OF CALIFORNIA  
SAN FRANCISCO DIVISION**

**AARON GREENSPAN,**

Plaintiff,

v.

**OMAR QAZI, et al.,**

Defendants.

Case No. 3:20-cv-03426-JD

**DEFENDANTS OMAR QAZI AND  
SMICK ENTERPRISES, INC.'S REPLY  
BRIEF IN SUPPORT OF MOTION TO  
DISMISS FOURTH AMENDED  
COMPLAINT UNDER FED. R. CIV. P.  
12(B)(6)**

Time: 10:00 a.m. PST  
Date: January 13, 2022  
Before: The Hon. James Donato  
Ctm.: 11, 19th Floor

## INTRODUCTION

In his Fourth Amended Complaint (“FAC”), Plaintiff Aaron Greenspan asserts claims against Defendants Omar Qazi and Smick Enterprises, Inc. (collectively, the “Smick Defendants”) under federal copyright and securities laws. Instead of responding to the defects identified in the Smick Defendants’ opening brief, Plaintiff spends most of his Opposition describing an alleged conspiracy among the Smick Defendants, the Tesla Defendants, and third parties. As a result, Plaintiff’s Opposition does not cure the defects in his FAC, as summarized below.

- **No Copyright Infringement/Fair Use**: Contrary to Plaintiff’s argument, the Smick Defendants’ alleged bad faith, unconnected to their use of Plaintiff’s autobiography *Authoritas*, is irrelevant to the fair use analysis. Moreover, Plaintiff concedes that the fourth fair use factor (*i.e.*, the effect on the market) is the single most important element, and that the Smick Defendants’ alleged use of *Authoritas* did not usurp Plaintiff’s market for his book—rather, the use allegedly tarnished Plaintiff’s goodwill, which is not a cognizable harm under the Copyright Act.
- **No Removal of CMI**: Plaintiff’s claim that the Smick Defendants removed copyright management information (“CMI”) in violation of 17 U.S.C. §1202(b) fails because the Smick Defendants’ alleged use of Plaintiff’s material was a fair use. Moreover, Plaintiff now concedes that he cannot allege that the Smick Defendants actually removed or altered any CMI, which is a requirement for any §1202(b) claim.
- **No DMCA Claim**: Plaintiff’s claim that the Smick Defendants violated 17 U.S.C. §512(f) fails because Plaintiff has not alleged that the Smick Defendants knowingly included false representations about fair use in their DMCA notices. To the contrary, the FAC’s allegations indicate that the Smick Defendants understood that their DMCA notices and counter notices were accurate.
- **No §10(b)/Rule 10b-5 Claim**: Plaintiff’s claim under §10(b) and Rule 10b-5 fails because Plaintiff has not explained how either of the two statements that he attributes to Omar Qazi is false.
- **No Market Manipulation Claim**: Plaintiff’s claim for Market Manipulation fails where



Plaintiff has not identified any specific misleading statement attributable to the Smick Defendants, let alone a statement that led to wash sales, matched orders, rigged prices, or some other manipulative act.

Given that Plaintiff has not stated a federal claim in his fifth version of the Complaint, the Court should dismiss Plaintiff's federal claims with prejudice and dismiss the state law claims without prejudice for lack of jurisdiction.

## ARGUMENT

### A. The Smick Defendants' alleged bad faith, unconnected to any use of *Authoritas*, has no bearing on the fair use analysis.

In their opening brief, the Smick Defendants explained that the use of portions of Plaintiff's autobiography, *Authoritas*, was a fair use because, among other reasons, the use had no effect on the potential market for *Authoritas*. Plaintiff argues that the Court need not analyze the four statutory fair use factors because the Smick Defendants acted in bad faith, and the fair use defense is not available to those who act in bad faith. (Opp. at 5:24-7:8.) Plaintiff's argument fails for two reasons.

First, so long as the statutory factors weigh in favor of fair use, the defendant's mental state or good faith is irrelevant to the fair use analysis. As an example, the Supreme Court held:

Finally, regardless of the weight one might place on the alleged infringer's state of mind, compare *Harper & Row*, 471 U.S., at 562, 105 S.Ct., at 2231 (fair use presupposes good faith and fair dealing) (quotation marks omitted), with *Folsom v. Marsh*, 9 F.Cas. 342, 349 (No. 4,901) (CCD Mass.1841) (good faith does not bar a finding of infringement); *Leval* 1126–1127 (good faith irrelevant to fair use analysis), we reject Acuff–Rose's argument that 2 Live Crew's request for permission to use the original should be weighed against a finding of fair use. Even if good faith were central to fair use, 2 Live Crew's actions do not necessarily suggest that they believed their version was not fair use; the offer may simply have been made in a good-faith effort to avoid this litigation. If the use is otherwise fair, then no permission need be sought or granted. Thus, being denied permission to use a work does not weigh against a finding of fair use.

*Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 585 n.18 (1994); see *Equals Three, LLC v. Jukin Media, Inc.*, 139 F. Supp. 3d 1094, 1106 (C.D. Cal. 2015) (“If using a song after requesting and being denied a license does not show bad faith, then neither does failing to obtain a license and continuing to use footage after being sent a demand letter.”). As discussed below, the fair use factors

all support a finding of fair use in this case. Thus, the Smick Defendants’ alleged motivation in displaying portions of *Authoritas* is irrelevant.

Second, even if the Smick Defendants’ alleged bad faith were relevant to the fair use analysis, that bad faith must be connected to the alleged copyright infringement. *See Harper & Row Publishers, Inc. v. Nation Enterprises*, 471 U.S. 539, 563 (1985) (describing bad faith actor as “a chiseler who infringes a work for personal profit”). Here, Plaintiff’s laundry list of alleged bad faith conduct by the Smick Defendants is unconnected to the display of *Authoritas*, let alone to the misuse of *Authoritas* for personal profit. Rather, the Smick Defendants’ alleged bad faith conduct includes being arrested on criminal charges, operating a “tax-evading unregistered corporation,” harassing Plaintiff and his family, falsely accusing Plaintiff of “serial rape and possession of child pornography,” smearing Plaintiff’s reputation, and vilifying Plaintiff before an audience of tens of millions. (Opp. at 6:9-7:1.) Thus, even if bad faith were relevant to the fair use defense, the bad faith alleged by Plaintiff is unconnected to the use of *Authoritas*.

To the extent Plaintiff argues that the Smick Defendants’ criticism of Plaintiff through the use of *Authoritas* reflects bad faith, such an argument fails under the express language of the Copyright Act. The Act’s preamble states that the fair use doctrine is designed to protect “criticism.” 17 U.S.C. §107; *see also Dr. Seuss Enterprises, L.P. v. ComicMix LLC*, 983 F.3d 443, 452 (9th Cir. 2020) (“The purpose and character of a parody fits squarely into preamble examples—particularly ‘criticism’ and ‘comment’—and has ‘an obvious claim’ to transformative use.”). Thus, the use of *Authoritas* to criticize does not reflect bad faith.

In summary, Plaintiff has not explained why the Smick Defendants’ alleged bad faith, which is unconnected to their alleged use of *Authoritas*, is relevant to the fair use inquiry.

**B. The statutory fair use factors show that the use of *Authoritas* was a fair use.**

In their opening brief, the Smick Defendants explained why the statutory fair use factors show that the use of *Authoritas* is a fair use. While Plaintiff argues that all four factors weigh against fair use, his claims are neither plausible nor persuasive.

**First Factor (Purpose of Use):** Plaintiff argues that the purpose of the Smick Defendants’ use of *Authoritas* was a “weapon to discredit Plaintiff’s research on Defendant Tesla,” which was

1 “driven by Defendants’ commercial interests.” (Opp. at 7:17-22.) This argument is not plausible.  
 2 The use of *Authoritas* is facially a juvenile criticism of Plaintiff and not a secret plot to buoy a  
 3 trillion-dollar corporation

4 **Second Factor (Nature of Work):** Plaintiff argues that while *Authoritas* is a non-fiction  
 5 book, it is full of “creative expression,” and while it is a published work, the lack of a marketing  
 6 campaign or book tour renders it akin to an unpublished manuscript. (Opp. at 8:12-17.) Despite  
 7 Plaintiff’s argument, the fact remains that *Authoritas* is a published non-fiction work for sale  
 8 through multiple channels, available at libraries, and offered in multiple media. (FAC ¶¶195, 207.)

9 **Third Factor (Amount Used):** Plaintiff argues that the Smick Defendants used “far more  
 10 than necessary to make a ‘fair’ critique of Plaintiff and/or Plaintiff’s writing.” (Opp. at 8:18-19.)  
 11 While Plaintiff cites the amount taken (*i.e.*, over 30 full-page excerpts and almost 100 smaller  
 12 excerpts), Plaintiff does not explain why this is an unfair amount or why this amount is more than  
 13 was needed to lampoon Plaintiff. Moreover, Plaintiff does not address the lack of public recognition  
 14 of *Authoritas* or the fact that the overriding purpose of the use was to parody the original, both of  
 15 which are relevant to evaluating the third fair use factor. *See Northland Fam. Plan. Clinic, Inc. v.*  
 16 *Ctr. for Bio-Ethical Reform*, 868 F. Supp. 2d 962, 980–81 (C.D. Cal. 2012).

17 **Fourth Factor (Effect on the Market):** Plaintiff does not challenge that the fourth factor  
 18 is the single most important factor. Nor does Plaintiff argue that the Smick Defendants’ use of  
 19 *Authoritas* has usurped Plaintiff’s market for the book. Instead, Plaintiff argues that the use of  
 20 *Authoritas* has destroyed Plaintiff’s goodwill through its biting criticism. (Opp. at 9:4-8.) However,  
 21 as this Court has found, “a diversion or suppression of demand from criticism is not a cognizable  
 22 copyright harm.” *In re DMCA Subpoena to Reddit, Inc.*, 441 F. Supp. 3d 875, 886 (N.D. Cal. 2020).  
 23 (quoting *Campbell v. Acuff-Rose Music, Inc.*, 510 U.S. 569, 593 (1994)).

24 Thus, despite Plaintiff’s arguments, the relevant factors weigh in favor of fair use.

25 **C. Plaintiff admits that Defendant did not remove or alter CMI, and thus Plaintiff has**  
 26 **not stated a claim under 17 U.S.C. §1202(b).**

27 Plaintiff claims that the Smick Defendants violated 17 U.S.C. §1202(b) by removing CMI  
 28 from Plaintiff’s “Purple Shirt Photograph.” To state a §1202(b) claim, a plaintiff must allege that



the defendant knew or had reason to know that the removal of CMI would induce, enable, facilitate, or conceal an infringement. *See* 17 U.S.C. §1202(b). For the reasons set forth above, the Smick Defendants’ alleged use of the Purple Shirt Photograph was a fair use. Thus, the Smick Defendants could not have intended to induce infringement. Plaintiff’s §1202(b) claim fails for this reason.

Moreover, Plaintiff now concedes that he cannot allege that the Smick Defendants actually removed or altered CMI, given that the original version of the Purpose Shirt Photograph, which the Smick Defendants allegedly copied, lacked CMI. “Section 1202(b) always requires removal or alteration of copyright management information in order to apply.” *Falkner v. Gen. Motors LLC*, 393 F. Supp. 3d 927, 938 (C.D. Cal. 2018). Thus, copying or displaying a version of a work that lacks CMI—even where a subsequent version of that work contained CMI—is not a violation of §1202(b). *See Aardwolf Indus., LLC v. Abaco Machines USA, Inc.*, No. CV 16-1968-GW(JEMX), 2017 WL 10350547, at \*12 (C.D. Cal. Nov. 13, 2017) (“Therefore, a reasonable jury could conclude that Defendants removed or acquired the Logo from one of these settings, and thus never removed or altered CMI, or displayed the Logo with knowledge that CMI had been removed or altered.”). Plaintiff argues that the Smick Defendants deliberately omitted CMI that they knew was on a subsequent version of the Purple Shirt Photograph. (Opp. at 10:2-3.) However, this allegation does not create a claim under §1202 because Plaintiff cannot allege that the Smick Defendants removed or altered CMI from the version of the Purple Shirt Photograph that they copied.

**D. Plaintiff has not alleged that the Smick Defendants made knowing misrepresentations in their DMCA notices and counter notices.**

Plaintiff argues that the Smick Defendants violated 17 U.S.C. §512(f) by issuing DMCA notices and counter notices that misrepresented their understanding of fair use. However, as the above analysis shows, fair use is often a complex issue on which Plaintiff and the Smick Defendants could reasonably disagree. With that in mind, Plaintiff’s FAC does not contain sufficient allegations that the Smick Defendants submitted DMCA notices while subjectively understanding that the notices contained misrepresentations about fair use.

In response to this pleading flaw, Plaintiff reiterates his position that Qazi submitted takedown notices because “he was angry.” (Opp. at 10:22-23.) However, “[u]nder § 512(f), a



copyright owner may be held liable for damages caused by an erroneous invocation of the notice and takedown provision only if the owner did not possess a subjective good faith belief that its copyright was being infringed.” *UMG Recordings, Inc. v. Augusto*, 558 F. Supp. 2d 1055, 1065 (C.D. Cal. 2008), *aff’d*, 628 F.3d 1175 (9th Cir. 2011). Even if Qazi submitted the DMCA notices out of anger, that does not mean that he submitted them with an understanding that they contained misrepresentations about fair use.

The FAC actually indicates the contrary—*i.e.*, that Qazi understood that his DMCA notices were legitimate. Plaintiff claims that after Qazi issued a takedown notice regarding the Autopilot Moving Violation Video on November 4, 2019, he created a website that same day “to purportedly show that the Autopilot Moving Violation Video was subject to copyright.” (FAC ¶¶225-26.) Plaintiff includes no allegation regarding Qazi’s mental state as to this notice. When Qazi issued a second takedown notice regarding the Autopilot Moving Violation Video nearly a year later, on September 18, 2020, Plaintiff alleges that Qazi claimed that the photograph “was suddenly subject to copyright despite no notice to that effect.” (FAC ¶¶231.) Yet, this takedown notice (the same one Plaintiff claims was motivated by Qazi’s “anger”) was for the same Autopilot Moving Violation Video for which Qazi created a website with a copyright notice a year earlier. (*compare* ¶¶FAC 225-226 *and* ¶¶231-232.) Thus, Plaintiff’s own allegations indicate that Qazi subjectively understood that the Autopilot Moving Violation Video was protected by copyright law and that the fair use doctrine did not apply.

Other than general allegations of animus between Plaintiff and the Smick Defendants, the FAC offers no other allegations regarding misrepresentations about fair use in the various DMCA notices. Thus, the FAC does not plausibly allege that the Smick Defendants believed that Plaintiff’s use was a protected fair use but submitted takedown notices anyway. *See Lenz v. Universal Music Corp.*, 815 F.3d 1145, 1154 (9th Cir. 2016).

Finally, Plaintiff has not alleged any injury resulting from the Smick Defendants’ DMCA notices. Plaintiff argues that “[t]he actual, forced removal of content based upon a false pretext is a *de facto* injury.” (Opp. at 11:5-6.) While such a *de facto* injury may be sufficient to establish Article III standing, *see Spokeo, Inc. v. Robins*, 578 U.S. 330, 340 (2016), it is not sufficient to establish

1 statutory standing under §512, which separately requires an injury to the plaintiff. *See Weinberg v.*  
 2 *Dirty World, LLC*, No. CV 16-9179-GW(PJWX), 2017 WL 5665022, at \*5 (C.D. Cal. Apr. 24,  
 3 2017); *see also Fahmy v. Jay-Z*, No. 207CV05715CASPJWX, 2016 WL 409644, at \*2 (C.D. Cal.  
 4 Feb. 1, 2016) (distinguishing Article III standing and statutory standing). Moreover, Plaintiff does  
 5 not actually identify any materials that were removed as a result of the allegedly fraudulent  
 6 takedown notices. (FAC ¶238.) *See UMG Recordings, Inc. v. Bright House Networks, LLC*, No.  
 7 8:19-CV-710-MSS-TGW, 2020 WL 11567025, at \*4 (M.D. Fla. Dec. 29, 2020) (§512(f) claim  
 8 failed where no takedown occurred)).

9 In short, Plaintiff's Opposition does not address the gaps in the FAC's allegations regarding  
 10 Qazi's mental state in issuing DMCA notices or Plaintiff's injury. Thus, Plaintiff's §512(f) claim  
 11 fails.

12 **E. Plaintiff has not explained how either of the two statements attributed to the Smick**  
 13 **Defendants is false, as necessary to state a claim under §10(b) and Rule 10b-5.**

14 Plaintiff argues that the following two statements, allegedly published by the Smick  
 15 Defendants on social media, violate §10(b) and Rule 10b-5 of the Securities Exchange Act:<sup>1</sup>

- 16 • "I wish I had the words to describe how amazing AutoPilot is. It's the eighth [sic] wonder  
 17 of the world."
- 18 • "So did Tesla lie about having the lowest probability of injury of any car? No, it didn't,  
 19 and nobody is saying it did. The Government's own numbers above confirm what Tesla  
 20 is saying. The NHTSA just only wants people to use the star rating. But Teslas are more  
 21 safe [sic]."

22 To be misleading, a statement must be "capable of objective verification." *Retail Wholesale*  
 23 *& Dep't Store Union Loc. 338 Ret. Fund v. Hewlett-Packard Co.*, 845 F.3d 1268, 1275 (9th Cir.

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24 <sup>1</sup> Plaintiff's Count VII for violation of section 10(b) of the Exchange Act and Rule 10b-5 appears  
 25 for the first time against Omar Qazi in the FAC. However, the Court instructed Plaintiff that he  
 26 could not add new claims or parties without leave of the Court. (Prior Order at 22:1-2.) Plaintiff  
 27 argues that this fact is "objectively false" because the Third Amended Complaint included the  
 28 same claims, the same parties, and the same argument that Defendant Qazi is an agent of  
 Defendants Tesla and Musk. (Opp. at 11 n. 6.) However, Count VII in the Third Amended  
 Complaint was for "Violation of Section 10(b) of the Exchange Act and Rule 10b-5 Against  
 Defendants Elon Musk and Tesla, Inc." Qazi was not identified as a responsible party in this prior  
 claim.



2017). While Plaintiff argues that the first statement “is not mere puffery,” nobody would believe that comparing an autopilot system to the wonders of the ancient world is capable of objective verification. Rather, the statement is facially an opinion and puffery.

As to the second statement, Plaintiff has still not explained how the statement is false. Rather, Plaintiff circularly argues that the statement “knowingly misrepresented NHTSA’s position.” However, Plaintiff does not explain what NHTSA’s position was or how the statement misrepresented it.

Moreover, Plaintiff cannot plausibly explain how these two statements were material to reasonable investors. A statement is material if there is a substantial likelihood that a reasonable investor would have acted differently if the statement had not been made or the truth had been disclosed. *See Mulquin v. Nektar Therapeutics*, 510 F. Supp. 3d 854, 865 (N.D. Cal. 2020). Materiality depends on whether a reasonable investor would have viewed the information as having significantly altered the total mix of information available. *See In re Novatel Wireless Sec. Litig.*, 830 F. Supp. 2d 996, 1012 (S.D. Cal. 2011). A reasonable investor would not have relied on these two statements, which were published on a Twitter feed authored by “Steve Jobs Ghost,” described as a “bottomless font of Muskolatry” (FAC ¶57), and containing posts like an altered version of Plaintiff’s restraining order application, seeking protection from “Little Billy Watkins,” age “5.” (FAC ¶46.) While Plaintiff argues that a single investor wrote that he relied on the Smick Defendants’ other statements, Plaintiff has not alleged—nor could he—that reasonable investors relied on the two above-referenced statements.

Finally, Plaintiff has not adequately pled Qazi’s scienter—*i.e.*, Plaintiff has not “state[d] with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2)(A); *see also Nguyen v. Endologix, Inc.*, 962 F.3d 405, 414 (9th Cir. 2020) (“The PSLRA’s ‘strong inference’ requirement has teeth. It is an exacting pleading obligation that presents no small hurdle for the securities fraud plaintiff.” (cleaned up)). The state of mind required to meet the scienter element is an intent to defraud or deliberate recklessness regarding the falsity of the challenged statements. *See Nguyen*, 962 F.3d at 414. The FAC contains no allegations that Qazi acted with an intent to defraud in making the two statements at issue.

1 For all of these reasons, Plaintiff has not stated a claim under §10(b) and Rule 10b-5.

2 **F. Plaintiff has not identified any misleading statements attributable to the Smick**  
 3 **Defendants as necessary to state a claim for Market Manipulation.**

4 Plaintiff argues that he has stated a claim for Market Manipulation under §10(b) of the  
 5 Securities Exchange Act and Rule 10b-5 because “the government has recently begun to include  
 6 social media in the long list of such devices.” (Mot. at 12:26-27.) While social media may be used  
 7 to commit market manipulation, the term “manipulation” still refers to a limited set of practices  
 8 such as wash sales, matched orders, or rigged prices, which are intended to mislead investors by  
 9 artificially affecting market activity. *See Desai v. Deutsche Bank Sec. Ltd.*, 573 F.3d 931, 938–39  
 10 (9th Cir. 2009). The gravamen of manipulation is deception of investors into believing that prices  
 11 at which they purchase and sell securities are determined by the natural interplay of supply and  
 12 demand, not rigged by manipulators. *See ScripsAmerica, Inc. v. Ironridge Glob. LLC*, 119 F. Supp.  
 13 3d 1213, 1237 (C.D. Cal. 2015).

14 Here, Plaintiff vaguely attributes 160,000 social media posts to the Smick Defendants, but  
 15 he has not identified any specific misleading statement, let alone a misleading statement that led to  
 16 wash sales, matched orders, rigged prices, or some other manipulative act. Nor has Plaintiff alleged  
 17 any deception of investors by the Smick Defendants’ statements nor a plausible allegation that the  
 18 Smick Defendants intended to mislead investors in publishing any specific statement. Plaintiff’s  
 19 allegations of the Smick Defendants’ bad faith generally is insufficient. *See Anschutz Corp. v.*  
 20 *Merrill Lynch & Co. Inc.*, 785 F. Supp. 2d 799, 816 (N.D. Cal. 2011) (Plaintiff must state with  
 21 particularity facts giving rise to a strong inference that the defendant acted with scienter). For all of  
 22 these reasons, Plaintiff’s claim for Market Manipulation fails.

23 **CONCLUSION**

24 For the reasons set forth above, the Court should dismiss all of Plaintiff’s federal claims under  
 25 Rule 12(b)(6) with prejudice and dismiss all of Plaintiff’s state law claims without prejudice for lack  
 26 of jurisdiction.

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1 Respectfully Submitted,

2 DATED: December 22, 2021

**KRONENBERGER ROSENFELD, LLP**

3 By: s/Karl S. Kronenberger  
4 Karl S. Kronenberger

5 Attorneys for Defendants Omar Qazi and Smick  
6 Enterprises, Inc.

